STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF CANTON,

Plaintiff/Counterdefendant-Appellant/Cross-Appellee,

v

44650, INC.,

Defendant/Counterplaintiff-Appellee/Cross-Appellant.

FOR PUBLICATION
April 13, 2023
9:10 a.m.

No. 354309
Wayne Circuit Court
LC No. 18-014569-CE

Before: CAMERON, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

In this dispute involving the constitutionality of the Charter Township of Canton Zoning Ordinance, § 5A.00, titled "Forest Preservation and Tree Clearing Ordinance" (hereinafter, "Tree Ordinance" or "Ordinance"), plaintiff, Canton Charter Township, appeals by right, and defendant, 44650 Inc., cross-appeals the opinion and order granting in part and denying in part defendant's motion for summary disposition under MCR 2.116(C)(10). In so ruling, the circuit court found that the Tree Ordinance, as applied to defendant, violated the Fourth Amendment of the United States Constitution, US Const, Am IV, as an unreasonable seizure and violated the Takings Clause of the Fifth Amendment of the United States Constitution, US Const, Am V, and Mich Const 1963, art 10, § 2 (Michigan's Takings Clause) as an unconstitutional condition, a physical categorical taking under *Horne v Dep't of Agriculture*, 576 US 350; 135 S Ct 2419; 192 L Ed 2d 388 (2015), and as a noncategorical taking under the ad hoc balancing test of *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). The circuit court otherwise rejected defendant's claim that the Tree Ordinance, as applied to defendant, amounted to the imposition of a penal fine under the Excessive Fines Clause of the Eighth Amendment of the United States Constitution, US Const, Am VIII.

On appeal, plaintiff argues that (1) collateral estoppel bars consideration of defendant's Fourth Amendment claim on the basis of litigation between it and FP Development (another landowner within Canton Township), see *FP Dev, LLC v Charter Twp of Canton, Mich*, 16 F4th 198 (CA 6, 2021), reh en banc den *FP Dev, LLC v Charter Twp of Canton, Mich*, unpublished

order of the United States Court of Appeals, Sixth Circuit, entered January 3, 2022 (Nos. 20-1447/1466), and, alternatively, the circuit court erred because the Fourth Amendment is not applicable to the Tree Ordinance as applied to defendant; (2) the "unconstitutional conditions doctrine" of *Nollan v Cal Coastal Comm*, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987), and *Dolan v City of Tigard*, 512 US 374; 114 S Ct 2309; 129 L Ed 2d 304 (1994), is inapplicable as a threshold matter because this case does not involve a dedication of real property as a condition for a land-use permit; and (3) the circuit court erred by finding a categorical physical taking under *Horne* and a regulatory taking under *Penn Central*. On cross-appeal, defendant contends that the circuit court erred by finding that the Tree Ordinance's tree fund fees are remedial, such that the Excessive Fines Clause of the Eighth Amendment is inapplicable.

We reverse, in part, the circuit court's summary disposition order with respect to the Fourth Amendment claim. We affirm, in part, with respect to the takings claims under the unconstitutional conditions doctrine and the Excessive Fines Clause claim under Eighth Amendment. This renders discussion of defendant's remaining takings claims unnecessary.

I. FACTUAL BACKGROUND

Defendant, a Michigan corporation whose resident agent is Gary Percy, is the owner of 16 acres of real property zoned "light-industrial" located in Canton Township. At the time of the parcel's purchase for $404,250 in August 2017, the property was surrounded on all four sides by industrial or commercial developments, including an adjacent parcel defendant owns and uses in its trucking business. Defendant intended to use the property for agricultural uses.

Before defendant's purchase, the property was part of a larger 40-acre parent parcel owned by FP Development (FP). A month before the conveyance, and as part of the application for the parcel split, plaintiff notified FP's and defendant's project representative via letter that a tree removal permit was required before any tree removal.

When the property was deeded to defendant, it was vacant and fully treed. Allegedly, the property was overrun with Ash and Buckthorn trees, invasive species subject to removal under state law, and had been used as a dumping ground for trash and debris. In October 2017, after issuance of the warranty deed, defendant clear-cut all the trees from the property and removed the existing stumps. Defendant did not obtain a tree removal permit.

Plaintiff first became aware of the tree removal six months later, in April 2018, when plaintiff's Township Landscape Architect and Planner, Leigh Thurston, received a call inquiring why so many trees were permitted to be removed from the subject property. Thurston viewed the property from a neighboring parcel and noted multiple violations of the Tree Ordinance.

The Tree Ordinance, subject to certain exceptions, requires a permit for the removal or relocation of any tree with a diameter at breast height (DBH) of six inches[1] or any "landmark"

[1] The Tree Ordinance defines "diameter at breast height" to mean "the diameter in inches of the tree measured at four feet above the existing grade." Tree Ordinance, § 5A.01.

tree.[2] Tree Ordinance, § 5A.05(A). A tree removal permit will be granted under the Tree Ordinance if plaintiff determines that the removal is "necessary" for the site improvement and no reasonable alternative exists, where the tree is dead or diseased, or where removal is consistent with good forestry practices. Tree Ordinance, § 5A.05(F)(4). The purpose of the Tree Ordinance "is to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources." Tree Ordinance, § 5A.02. To this end, § 5A.08 requires relocation or replacement of trees upon their removal; in particular, the Tree Ordinance requires replacement of landmark trees on a 1 to 3 ratio and replacement of other regulated trees on a 1 to 1 ratio.

Generally, the Tree Ordinance dictates that replacement trees must be located on the same parcel of land on which the activity is to be conducted. Tree Ordinance, § 5A.08(E). Where tree relocation or replacement on the same property is not possible, the Tree Ordinance requires the permit grantee to "[p]ay monies into the township tree fund for tree replacement within the township" or "[p]lant the required trees off site." Tree Ordinance, § 5A.08(E)(1)-(2). With respect to the tree fund, the Tree Ordinance provides that "[t]hese monies shall be equal to the per-tree amount representing the current market value for the tree replacement that would have been otherwise required." Tree Ordinance, § 5A.08(E)(1). At the time of this litigation, the market value of regulated trees was between $225 and $300 per tree and $450 for landmark trees.

Subsequently, after viewing the property from afar, Thurston contacted defendant to advise it of the violations. The parties agreed on a date for plaintiff to inspect the property, and in August 2018, plaintiff and its agents, using representative plots from the parent parcel, conducted an analysis to estimate the number of trees removed. Plaintiff concluded that defendant had cleared 100 landmark trees and 1,385 regulated trees from the property.

That same month, plaintiff issued defendant a notice of violation requesting it to resolve the violation. Consistent with its Tree Ordinance, plaintiff required defendant to either replace the 1,485 trees removed in the ratios the Ordinance required, or pay the market value of the trees into the tree fund, approximately $446,625. Despite attempts at informal resolution, plaintiff, in October 2018, learned through news media that defendant had planted 1,000 Norway Spruce on the property for a Christmas tree farm.[3]

[2] The Tree Ordinance defines "landmark/historic tree" to mean "any tree which stands apart from neighboring trees by size, form or species, as specified in the landmark tree list . . . or any tree, except box elder, catalpa, poplar, silver maple, tree of heaven, elm or willow, which has a DBH of 24 inches or more." Tree Ordinance, § 5A.01.

[3] Because the property is zoned light industrial, agricultural uses like a Christmas tree farm are not permitted on the property. To use the property in this manner would require defendant to submit a rezoning application and apply for a variance, given that agricultural activities are not permitted on property less than 40 acres. Defendant never submitted any such application.

II. PROCEDURAL HISTORY

In November 2018, plaintiff filed the instant complaint alleging multiple violations of the Tree Ordinance. Plaintiff sought a declaratory judgment that the actions taken by defendant were violations of the Tree Ordinance and a nuisance per se under MCL 125.3407, and an order requiring defendant to correct the violations and to pay the required amount into the tree fund.

Defendant responded to the complaint, denying the allegations therein and raising multiple counterclaims. Specifically, defendant alleged that the Tree Ordinance constituted an unreasonable seizure in violation of the Fourth Amendment of the United States Constitution, US Const, Am IV; an unlawful per se and as-applied taking under the Fifth Amendment of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 10, § 2; an unconstitutional condition on the use of property under the Fifth Amendment of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 10, § 2; and an excessive fine under the Eighth Amendment of the United States Constitution, US Const, Am VIII.

Defendant moved for summary disposition under MCR 2.116(C)(10) as to its constitutional claims.[4] Defendant argued that the Tree Ordinance was a per se regulatory taking similar to that in *Horne* because the Tree Ordinance forbids defendant from exercising any property rights related to the trees. The Tree Ordinance effectively takes possession of the trees because defendant cannot use, sell, or destroy the trees without paying plaintiff the current market value. Defendant also posited that the Tree Ordinance was a per se regulatory taking under *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982), because it forced defendant to maintain unwanted objects on the property. Defendant argued that the Tree Ordinance constituted a regulatory taking under the balancing approach of *Penn Central*. In particular, the economic impact of the Ordinance on defendant was substantial, given that plaintiff sought more money than the property itself was worth; defendant's investment-backed expectations had been adversely impacted, given that the Ordinance deprived defendant of nearly any use of the property; and, the character of the Tree Ordinance was to provide public benefits at defendant's expense. Relatedly, defendant argued that the Tree Ordinance was an unconstitutional condition or exaction under *Nollan* and *Dolan* because the Ordinance did not allow for site specific mitigation. With regard to its Fourth Amendment claim, defendant argued that the Tree Ordinance was a "meaningful interference" with its property interest in the trees because it prevented defendant from felling, moving, or selling the trees. This interference was unreasonable because it was not justified by any risk to the public and it was uncompensated. Finally, defendant argued that the Tree Ordinance's tree fund violated the Excessive Fines Clause of the Eighth Amendment because the fees were grossly disproportionate—the record did not support that removal of the trees caused any harm and the maximum criminal fine for the same conduct is only $500.

In response, plaintiff countered that the Tree Ordinance does not constitute a taking. According to plaintiff, *Horne* is distinguishable because the government actually acquired title to the property owner's personal property. Plaintiff had not taken defendant's trees, nor did it prevent defendant from selling the timber. Plaintiff also posited that *Loretto* was distinguishable because

[4] Plaintiff filed a cross-motion for summary disposition on its claims, but withdrew the motion so that the constitutional issues could be decided.

plaintiff had not put unwanted objects on defendant's property. Regarding the claim that a regulatory taking had occurred under *Penn Central*, plaintiff countered that the Tree Ordinance promotes a public interest that is ubiquitous and the evidence did not support an economic impact or effect on defendant's investment-backed expectations. As to the unconstitutional conditions doctrine, plaintiff argued that no such exaction had occurred because an individualized assessment had been made and there was no showing that the fees were not proportional. Plaintiff asserted that the Fourth Amendment did not apply because a takings claim was available under the Fifth Amendment. Lastly, plaintiff argued that the Eighth Amendment Excessive Fines Clause was not implicated because monies paid into the tree fund were not penal.

While defendant's motion was pending, the United States District Court for the Eastern District of Michigan released its decision in *FP Dev, LLC v Charter Twp of Canton*, 456 F Supp 3d 879 (2020), aff'd 16 F4th 198 (CA 6, 2021), in which that court considered a constitutional challenge to the Tree Ordinance brought by FP, which had also faced penalties under the Ordinance. Like the instant case, FP alleged that the Tree Ordinance was an unlawful taking without just compensation, both per se and as applied, under the Fifth Amendment, was an unconstitutional seizure under the Fourth Amendment, and was an excessive fine in violation of the Eighth Amendment. *Id*. at 882. On the parties' cross-motions for summary judgment, the federal district court determined that the Tree Ordinance did not constitute a per se taking under either *Horne* or *Loretto*, but was an unconstitutional regulatory taking under the balancing test of *Penn Central* and an unconstitutional exaction under *Nollan* and *Dolan*. *Id*. at 888-895. The federal district court rejected FP's Fourth and Eighth Amendment claims, reasoning that none of the Fourth Amendment cases FP relied on involved real property and the Excessive Fines Clause of the Eighth Amendment did not apply because the fees were remedial, not punitive. *Id*. at 895-896. Plaintiff appealed this decision to the United States Court of Appeals for the Sixth Circuit. See *FP Dev, LLC v Charter Twp Canton of Canton, Mich*, 16 F4th 198 (CA 6, 2021).

As a consequence of the federal decision, the circuit court requested supplemental briefing on the issue of res judicata. Defendant argued in its brief that collateral estoppel, or claim preclusion, barred relitigation of issues already litigated in the federal decision. Defendant posited that the federal district court had entered a final judgment on the merits, plaintiff had a full and fair opportunity to litigate whether the Tree Ordinance was an unconstitutional exaction, and mutuality of estoppel was not required because defendant raised collateral estoppel defensively.

Plaintiff countered that res judicata did not apply because the instant case does not involve the same parties. Plaintiff also contended that collateral estoppel was inapplicable. The requirement that the parties have a full and fair opportunity to litigate had not been satisfied because plaintiff was appealing the federal decision and the decision was only binding as to the parties in the FP litigation. The doctrine did not bar relitigation of the constitutionality of the Tree Ordinance under *Penn Central* because that analysis is fact-specific to the particular owner and no issues had been determined as to defendant in this case.

After a hearing, the circuit court granted in part and denied in part defendant's motion for summary disposition. The court first considered defendant's takings claim under *Horne* and agreed a taking had occurred because "[t]he value of the trees has been claimed for [plaintiff's] use to fund the tree fund." The circuit court next found that *Loretto* was inapplicable because plaintiff had not directly, physically invaded defendant's property. Regarding the balancing test

of *Penn Central*, the court found the economic impact of the Tree Ordinance goes too far because the amount defendant is expected to pay into the tree fund exceeds the value of the property and "precipitates an unreasonable economic effect on any 'investment-backed expectations[.]' " The court found that the character of the Tree Ordinance requires private property owners to preserve plaintiff's property by making the owner pay into a tree fund. Accordingly, the Tree Ordinance was a constitutionally invalid regulatory taking under *Penn Central*. The circuit court likewise found that the Tree Ordinance imposed unconstitutional conditions on the use of the property under *Nollan* and *Dolan*; mainly, the condition of replacing trees on the property or somewhere else, or payment into the tree fund, "bears no relationship to the aesthetics of the subject property, but only provides a benefit to [plaintiff.]" Addressing defendant's Fourth Amendment claim, the circuit court found, "given the facts of this case where the owner is forced to pay for tree removal at an unreasonable cost, the Fourth Amendment claim is applicable as to a seizure of property to the extent that it is a 'meaningful interference' with [defendant's] 'possessory interests' in its property." Lastly, the circuit court determined that the Excessive Fines Clause of the Eighth Amendment was inapplicable because payments to the tree fund are not punishments for an offense, but are part of plaintiff's land-use regulatory scheme.

At the end of its opinion, the circuit court addressed res judicata as follows:

> [C]ollateral estoppel does not apply [sic: to] the "regulatory takings" challenge because it requires an "as-applied" analysis and application of the *Penn Central* balancing test. As to the "unconstitutional conditions" contention, collateral estoppel does apply. Because the District Court did not undertake an examination of the ordinance's "meaningful interference" that would constitute an unreasonable seizure of the property, collateral estoppel is inapplicable. Finally, collateral estoppel also applies to the Eighth Amendment 'excessive fines' claim.

Plaintiff appeals the circuit court's order by right. In the interim and before briefing commenced in this appeal, the United States Court of Appeals for the Sixth Circuit scheduled oral argument in *FP Dev*. Consequently, the parties filed a joint motion with this Court requesting that the briefing schedule be stayed until after the Sixth Circuit's decision. This Court agreed and entered an order holding this appeal in abeyance until that court issued an opinion and order. See *Charter Twp of Canton v 44650, Inc*, unpublished order of the Court of Appeals, entered April 26, 2021 (Docket No. 354309).

In October 2021, the Sixth Circuit released its decision affirming the district court's decision in *FP Dev, LLC v Charter Twp of Canton, Mich*, 16 F4th 198 (CA 6, 2021). Regarding FP's takings claims, the Sixth Circuit agreed that the Tree Ordinance constituted an unconstitutional condition under *Nollan* and *Dolan* because plaintiff failed to show that the Ordinance's mitigation requirements were based on an individualized impact assessment. *Id.* at 205-208. Because the unconstitutional conditions analysis was dispositive on the takings claims, the Sixth Circuit did not consider the other takings theories of relief. *Id.* at 204. The Sixth Circuit affirmed the conclusion that the Fourth Amendment did not apply to the Tree Ordinance because the United States Supreme Court has held that real property is not an "effect" within the meaning of that Amendment. *Id.* at 208. Finally, the court affirmed the district court's conclusion

that the "purpose [of the Tree Ordinance] is remedial, not punitive, so it does not implicate the Eighth Amendment." *Id.* at 209.[5]

III. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Summary disposition under MCR 2.116(C)(10) is proper if there is no genuine issue about any material fact and the moving party is entitled to judgment as a matter of law. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). In reviewing the circuit court's decision, this Court "considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof . . . on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.* "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

This Court also reviews constitutional questions de novo. *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 311; 805 NW2d 226 (2011). Further, plain-error review is proper for unpreserved claims of error. *Henderson v Dep't of Treasury*, 307 Mich App 1, 9; 858 NW2d 733 (2014). "To establish plain error, petitioner must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights." *Id.* (quotation marks and citation omitted).

IV. FOURTH AMENDMENT UNLAWFUL SEIZURE

A. COLLATERAL ESTOPPEL

On appeal, plaintiff first argues that collateral estoppel bars relitigation of whether application of the Tree Ordinance was an unlawful seizure under the Fourth Amendment, given that the Sixth Circuit's decision on this issue was favorable to plaintiff.[6] Plaintiff contends that all

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[5] Plaintiff filed a petition for rehearing en banc before the Sixth Circuit, and this Court's abeyance was extended. *Charter Twp of Canton v 44650, Inc*, unpublished order of the Court of Appeals, entered December 7, 2021 (Docket No. 354309). The Sixth Circuit ultimately denied the petition because "the issues raised . . . were fully considered upon the original submission and decision of the cases," and "[n]o judge has requested a vote on the suggestion for rehearing en banc." *FP Dev, LLC v Charter Twp of Canton, Mich*, 16 F4th 198 (CA 6, 2021).

[6] Plaintiff did not argue in the circuit court that the Sixth Circuit decision should have preclusive effect under the doctrine of collateral estoppel, likely because that decision had not yet been

the elements of collateral estoppel are met, despite that defendant was not a party to the prior federal litigation. In particular, plaintiff asserts that defendant was a privy of FP's, with "substantial identity of interests," because defendant and FP raised the same claims relative to the Tree Ordinance and FP owned the parent parcel before it was split and the warranty deed transferred the subject property to defendant.

"Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 528; 866 NW2d 817 (2014). The doctrine is a flexible one, intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990) (quotation marks and citation omitted). Generally, collateral estoppel applies if the following elements are satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks, citation, and footnote omitted). "[O]ne of the critical factors in applying . . . collateral estoppel involves the determination of whether the respective litigants were parties or privy to a party to an action in which a valid judgment has been rendered." *Mecosta Co Med Ctr v Metro Group Prop & Cas Ins Co*, 509 Mich 276, 283; 983 NW2d 401 (2022). In other words, "collateral estoppel appl[ies] only when the parties in the subsequent action were parties or privies of parties to the original action." *Id*.

In this matter, there is no dispute that defendant was not a party to the prior federal action involving FP. Consequently, the applicability of collateral estoppel against defendant in this action turns on whether defendant can be deemed a privy of FP. With respect to privity in the context of collateral estoppel, the Michigan Supreme Court recently stated in *Mecosta Co Med Ctr*, *id*. at 283-284:

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released. This argument, therefore, is not preserved. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) (indicating that preservation requirements are met if a party raises a claim, even if the lower court fails to address it). However, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). We note that a split in authority exists in Michigan Court of Appeals jurisprudence whether, in the context of civil cases, arguments that are not raised in the lower court are waived and, thus, precluded form appellate consideration, see *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 193-194; 920 NW2d 148 (2018), or, alternatively, whether those unraised arguments may be considered under plain-error review when the principles espoused in *Smith*, 269 Mich App at 427, justify review.

> To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. In its broadest sense, privity has been defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." [Quotation marks and citations omitted.]

Under this definition, defendant cannot be deemed a privy of FP. This is because, under the present circumstances, FP did not "represent[] the same legal right that the later litigant [(defendant)] is trying to assert." *Id*. at 283 (quotation marks and citation omitted). Rather, FP sought to assert rights related to an entirely different parcel of property than that which defendant sought to assert.

On appeal, plaintiff disagrees, contending privity exists because FP and defendant have raised the same claims and FP owned the parent parcel before the lot split and execution of the warranty deed transferring the property to defendant. It is generally true that an assignment, such as a transfer of property by a warranty deed, is sufficient to create privity, given that the assignee succeeds to the rights of the assignor. *Id*. at 284. However, in the context of an assignment,

> [t]he binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner. In other words, the assignee succeeds to those rights subject to any earlier adjudication involving the assignor that defined those rights. When the litigation involving the assignor occurs after the assignment, the rights could not yet have been affected by the litigation at the time they were transferred to the assignee.
>
> It is therefore well established that a judgment entered after the assignment does not bind the assignee because the assignee is not in privity with the assignor with respect to that judgment. [*Id*. at 284-285 (quotation marks and citation omitted).]

See also *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43; 191 NW2d 313 (1971) ("A privy is one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase.") (emphasis added).

FP was never involved in any litigation related to the subject property before the transfer and only sought to assert rights related to the parcel it retained in the subsequent federal litigation. Consequently, despite that an assignor-assignee relationship exists, the assignment did not make defendant a privy of FP because the federal judgment was rendered after the assignment. *Mecosta Co Med Ctr*, 509 Mich at 284-285. Further, that defendant raises the same claims as FP is insufficient to create privity: "Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts." *Id*. at 284 (quotation marks and citation omitted). Accordingly, collateral estoppel does not apply to bar defendant from pursuing its Fourth Amendment claim.

B. UNLAWFUL SEIZURE

Turning to the merits, plaintiff argues that the circuit court erred by concluding that the Tree Ordinance's mitigation measures constituted a meaningful interference with defendant's possessory interests in its property in violation of the Fourth Amendment. Plaintiff urges this Court instead to adopt the reasoning of the Sixth Circuit, which rejected defendant's Fourth Amendment claim on the grounds that the Tree Ordinance is not subject to the Fourth Amendment because real property, like trees, are not houses, persons, papers, or effects. See *FP Dev, LLC*, 16 F4th at 208.[7]

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, *Ker v California*, 374 US 23, 30; 83 S Ct 1623; 10 L Ed 2d 726 (1963), provides, in pertinent part, that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated . . . ." US Const, Am IV. "A 'seizure' of property . . . occurs when there is some meaningful interference with an individual's possessory interests in that property." *Soldal v Cook Co, Ill*, 506 US 56, 61; 113 S Ct 538; 121 L Ed 2d 450 (1992) (quotation marks and citation omitted). To establish a Fourth Amendment violation, this meaningful interference must be "unreasonable," either because it is unjustified by state law, or if justified, uncompensated. *Id*. at 61-62.

In this matter, even if application of the Tree Ordinance could be construed as meaningfully interfering with defendant's possessory interests in its trees, the Fourth Amendment is not implicated. This is because the protection accorded by the Fourth Amendment extends to persons, houses, papers, and effects and does not include trees located in an open field. As the Sixth Circuit recognized, standing trees are real property under Michigan law. *FP Dev, LLC*, 16 F4th at 208, citing *Kerschensteiner v Northern Mich Land Co*, 244 Mich 403, 417; 221 NW 322 (1928) ("Standing timber is real estate. It is a part of the realty the same as the soil from which it grows." (Quotation marks omitted.)) And, significantly for Fourth Amendment purposes, the trees on defendant's 16-acre parcel were located on a fully treed parcel, akin to an open field, and not near a home or its curtilage. Fourth Amendment protections do not extend to "open fields[,]" but are limited to "persons, houses, papers, and effects[.]" *Oliver v United States*, 466 US 170, 176; 104 S Ct 1735; 80 L Ed 2d 214 (1984). Trees are not persons, houses, or papers. Such trees are also not "effects," which the United States Supreme Court has recognized to "be limited to personal, rather than real, property." *Id*. at 177 n 7. Under this analysis, which is essentially the same as that adopted by the Sixth Circuit, application of the Tree Ordinance to defendant does not implicate the Fourth Amendment.

On appeal, defendant argues that this Court should not be swayed by the rationale of the Sixth Circuit because its discussion of the Fourth Amendment was dicta. In support, defendant posits that the court's determination that the Tree Ordinance was an unconstitutional condition under the Takings Clause of the Fifth Amendment made its comments regarding the Fourth Amendment nonessential obiter dicta. This argument is disingenuous. A party may have multiple

[7] We note that decisions of the federal district court are not binding precedent, but may be considered for their persuasive value. *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

constitutional claims addressing specific harms that are based on the same set of facts. See *United States v James Daniel Good Real Prop*, 510 US 43, 49-50; 114 S Ct 492; 126 L Ed 2d 490 (1993). The Fourth and Fifth Amendment address different harms and have different legal elements, i.e., to prevail on a Fourth Amendment claim a plaintiff must prove an unreasonable seizure, whereas to prevail on a takings claim a plaintiff must prove the government took property without just compensation. When both the Fourth and Fifth Amendments are implicated, the proper question is whether either Amendment was violated, *id*. at 50; a conclusion that one Amendment was violated does not foreclose a conclusion regarding the other Amendment. Accordingly, contrary to defendant's assertion, the Sixth Circuit's pronouncement regarding defendant's takings claim did not render the court's discussion of the Fourth Amendment dicta.

Finally, defendant asserts that this Court is not bound to follow the Sixth Circuit's Fourth Amendment analysis because the Sixth Circuit's rationale is "in tension" with other federal appellate circuits and the United States Supreme Court. In support, defendant cites decisions applying the Fourth Amendment to seizures of real property. See *James Daniel Good Real Prop*, 510 US 43; *Severance v Patterson*, 566 F3d 490 (CA 5, 2009); *Presley v Charlottesville*, 464 F3d 480 (CA 4, 2006). The caselaw that defendant cites, however, is unpersuasive because it does not contradict the Sixth Circuit's (or this Court's) analysis. Mainly, each of the cases applying the Fourth Amendment to real property involved parcels that included homes, which the Fourth Amendment expressly protects. See *James Daniel Good Real Prop*, 510 US at 51-52 (indicating Fourth Amendment applies to seizure of a 4-acre parcel that included a home); *Presley*, 464 F3d at 484 n 3 (allowing Fourth Amendment claim to proceed where city action allowed citizens to trespass on property that included a home, and recognizing that Fourth Amendment may not protect real property other than a house and its curtilage); *Severance*, 566 F3d at 502 (indicating Fourth Amendment applied to state-appropriated easement on properties that included homes). In this matter, the real property at issue is trees that were located on an otherwise vacant parcel. These cases, therefore, are unpersuasive and do not direct the result in this matter.

V. THE TAKINGS CLAUSE—UNCONSTITUTIONAL CONDITIONS

Plaintiff next argues that the circuit court erred by applying the unconstitutional conditions doctrine of *Nollan* and *Dolan*. According to plaintiff, that doctrine is inapplicable because the Tree Ordinance does not demand property from a property owner in exchange for a permit.[8] Defendant counters that collateral estoppel applies to preclude consideration of this issue. In defendant's view, this issue was fully and actually litigated before the Sixth Circuit, despite that neither the opinion nor the order expressly addressed the issue plaintiff raises here.

[8] Plaintiff did not argue in the circuit court that the unconstitutional conditions doctrine was inapplicable in the absence of a dedication of real property as a condition for a land-use permit. Thus, this issue is unpreserved. See *Peterman*, 446 Mich at 183 (indicating that preservation requirements are met if a party raises a claim, even if the lower court fails to address it). However, as noted above, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith*, 269 Mich App at 427.

A. COLLATERAL ESTOPPEL

Whether collateral estoppel applies would be dispositive and, thus, its applicability is considered first. Recall that, "[c]ollateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding." *Rental Props Owners Ass'n*, 308 Mich App at 528. Generally, collateral estoppel applies if the following elements are satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat*, 469 Mich at 682-684 (quotation marks, citation, and footnote omitted). "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Id*. at 684.

In this matter, while collateral estoppel was not available to plaintiff because defendant was not a party or privy in the prior federal suit, this mutuality of estoppel requirement is suspended with respect to defendant's use of the doctrine. See *id*. at 691-692 ("[L]ack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit."). Whether defendant can avail itself of the doctrine, then, depends on whether the issue plaintiff raises—whether *Nollan* and *Dolan* are applicable in the first instance because the Tree Ordinance required no dedication of property—was actually litigated and determined by a valid and final judgment. See *Rental Props Owners Ass'n*, 308 Mich App at 528 (stating elements of collateral estoppel).

Having reviewed both the Sixth Circuit's opinion and its order denying en banc review, it is plain that that court did not make a determination with respect to the argument that plaintiff raises here. Absent from the Sixth Circuit opinion is any analysis whether *Nollan*/*Dolan* apply in the absence of a dedication of property. Likewise, while the order denying en banc review indicates that the "issues raised in the petition were fully considered upon the original submission," *FP Dev, LLC*, unpublished order of the United States Court of Appeals, Sixth Circuit, entered January 3, 2022 (Nos. 20-1447/1466), that statement provides no *determination* of the issue plaintiff raises. Consequently, even if plaintiff raised the argument before the Sixth Circuit as defendant contends, collateral estoppel does not apply because the Sixth Circuit did not actually determine whether *Nollan*/*Dolan* applies in the absence of a dedication of property. Moreover, defendant cites no law that collateral estoppel applies when the issue was not actually and necessarily determined in that prior proceeding. In sum, collateral estoppel does not apply to preclude consideration of plaintiff's argument.

B. UNCONSTITUTIONAL CONDITIONS

Turning to the merits, plaintiff argues that the circuit court erred by applying the unconstitutional conditions doctrine of *Dolan* and *Nollan* to the Tree Ordinance. According to plaintiff, that doctrine is inapplicable because the Tree Ordinance requires no underlying dedication of real property as occurred in both *Nollan* and *Dolan*.

Generally, under the unconstitutional conditions doctrine, "the government cannot attach conditions to government benefits that effectively *coerce* individuals into relinquishing their constitutional rights." *AFT Mich v Michigan*, 497 Mich 197, 226; 866 NW2d 782 (2015).[9] While the United States Supreme Court has applied this doctrine in a variety of contexts, the land-use permitting process, wherein landowners seek governmental authorization to develop their properties, requires a particular and special application of this doctrine under *Nollan* and *Dolan* necessary to protect landowners' Fifth Amendment right to just compensation. Primarily, the doctrine developed under *Nollan* and *Dolan* is intended to account for two competing realities of the permitting process: (1) that inherent in this process is the opportunity for coercive government action, wherein a government can pressure an applicant to give up property—that would otherwise require compensation—in exchange for a permit; and (2) that land developments often threaten to impose costs on the public that may legitimately be offset by dedications of property. *Koontz v St Johns River Water Mgt Dist*, 570 US 595, 604-605; 133 S Ct 2586; 186 L Ed 2d 697 (2013).

In *Nollan*, 483 US at 827, the Court considered whether the California Coastal Commission could condition its grant of a permit on the owners' transfer to the public of an easement across their beachfront property. After noting that a taking would have occurred had California simply required the owners to dedicate the easement, the Court queried whether conditioning the permit on the dedication should alter the outcome. *Id.* at 831, 834. Considering California's purported reasons for the easement—protecting the public's ability to see the beach—the Court determined that the condition (the dedication) failed to further the ends that California sought to meet by taking the property because passersby could already see the beach if they were on the easement. *Id.* at 835, 838-839. Consequently, an essential nexus between the permit condition and the governmental purpose was missing, making the regulation nothing other than "an out-and-out plan of extortion." *Id.* at 837 (quotation marks and citation omitted).

Next, in *Dolan*, 512 US at 377, the Court took up the issue left open in *Nollan*: what "degree of connection" must exist between a government exaction and the proposed impacts of a development. There, the Court considered whether an Oregon city could condition a building permit on the dedication of a portion of property for purposes of flood and traffic control. *Id.* After concluding that a sufficient nexus existed between preventing flooding and reducing traffic congestion and the condition (limiting development), the Court adopted a "rough proportionality" standard for determining whether the degree of the exaction bears the "required relationship to the

[9] Defendant pleaded a violation of both the Fifth Amendment of the United States Constitution and Const 1963, art 10, § 2, under the unconstitutional conditions doctrine. No published Michigan caselaw has considered the applicability of the unconstitutional conditions doctrine to Const 1963, art 10, § 2, in the land-use permitting context. The Michigan Supreme Court, however, considering the constitutionality of a retiree benefits system, analyzed the unconstitutional conditions doctrine of the Fifth Amendment as coextensive with Const 1963, art 10, § 2. *AFT Mich*, 497 Mich at 228. Neither party has argued that this Court should analyze their unconstitutional conditions arguments in a manner in any way distinct from the United States Supreme Court's application of the doctrine to claims arising under the Fifth Amendment of the United States Constitution. For this reason, the claims under Const 1963, art 10, § 2, and the Fifth Amendment of the United States Constitution are analyzed coextensively.

projected impact" of the development. *Id*. at 387-388. Under this standard, a government "must make some sort of individualized determination that the required dedication is related in both nature and extent to the impact of the proposed development." *Id*. at 391. Because the city only showed that the dedication could offset some traffic demand and lessen congestion, it failed to meet its burden of demonstrating that the additional number of commuters generated by the development "reasonably relate[d]" to the city's requirement for the dedication. *Id*. at 395.

Ultimately, *Nollan* and *Dolan* culminated in the following test, which the Supreme Court articulated in a later case, *Koontz*: the government may "condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 570 US at 605-606. Although the Court in *Koontz* did not apply this test because it did not reach the issue, its decision was significant because the Court extended the Fifth Amendment unconstitutional conditions doctrine to monetary exactions. *Id*. at 612, 619.

In *Koontz*, *id*. at 599-601, the petitioner sought a permit to develop a 14.9-acre property comprised of wetlands; in his application, the petitioner sought to develop the northern 3.7 acres and dedicate the remaining acreage to the Florida water management district to mitigate the environmental impacts of the development.[10] The district denied the application, giving the petitioner two alternatives: develop a smaller one-acre portion of the property and dedicate a larger conservation easement of 13.9 acres to the district or proceed with the development as proposed and agree to hire contractors to make improvements on approximately 50-acres of district-owned land. *Id*. at 601. The Florida Supreme Court determined that *Nollan* and *Dolan* did not apply, in part, because the district made a demand for money rather than a demand for an interest in real property. *Id*. at 603. The Supreme Court reversed, noting that if it agreed with the Florida Supreme Court, permitting officials could easily evade the limitations of *Nollan* and *Dolan*. *Id*. at 612. The Court explained:

> Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, . . . and they are functionally equivalent to other types of land use exactions. For that reason . . . we . . . hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*. [*Id*. at 612.]

Significantly, the Court also rejected the argument that a requirement that a petitioner spend money to improve public lands could not give rise to a taking. *Id*. at 613-614. The Court reasoned that the demand for money at issue " 'operate[d] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Id*. at 613.

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[10] Florida's Warren S. Henderson Wetlands Protection Act, 1984 Fla Laws ch 84-79, pt VIII, § 403.905(1), required permit applicants seeking to develop wetlands to offset the environmental damage caused by the development, by creating, enhancing, or preserving wetlands elsewhere. See *Koontz*, 570 US at 601.

In this way, the monetary exaction burdened the petitioner's ownership of a specific parcel of land. *Id*. at 613. Because of this "direct link" between the district's demand and the specific parcel of real property, the Court determined that the core concerns of *Nollan* and *Dolan* are implicated, i.e., the risk that the government will abuse its power to pursue ends lacking an essential nexus and rough proportionality to the effects of the new use of the property, thereby diminishing the value of the property without justification. *Id*. at 614.

On appeal, plaintiff, recognizing that both *Nollan* and *Dolan* involved public dedications of land as conditions for obtaining a land-use permit, argues that the unconstitutional conditions doctrine is inapplicable to this matter because the Tree Ordinance requires no underlying dedication of real property. Plaintiff further contends that *Koontz* is inapplicable because the factual scenario of that case—a demand for an easement or a demand for money in lieu of that easement—is not present in this matter. According to plaintiff, *Koontz* did not extend *Nollan* and *Dolan* to "just any payment required as a condition for a permit to engage in a desired use of property[.]"

Certainly, the facts of this matter are different than *Koontz*. Under the Tree Ordinance, defendant must either pay fees into the tree fund or replace the trees at its own expense. Tree Ordinance, § 5A.08. There is no dedication of real property demanded in exchange for the use permit, nor have any fees been demanded in lieu of such a dedication. *Koontz*, however, did not expressly limit its holding to the factual circumstances before the Court or otherwise hold that *Nollan* and *Dolan* apply to monetary exactions only so long as they are demanded as an alternative in lieu of a dedication. Instead, the Court's holding is fashioned in broader terms, stating that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when . . . its demand is for money." *Koontz*, 570 US at 619. While this holding is lacking in terms of exactly what types of monetary conditions are subject to heightened review,[11] it suffices for purposes of addressing plaintiff's argument to conclude that *Koontz* did not limit the applicability of the unconstitutional conditions doctrine to money demands in lieu of dedication.[12]

[11] The *Koontz* Court indicated that its decision did not affect "property taxes, user fees, and similar laws and regulations that may impose financial burden on property owners." *Koontz*, 570 US at 615. See generally, Mulvaney, *The State of Exactions*, 61 WM & MARY L REV 169 (2019) (discussing courts' difficulties with applying unconstitutional conditions doctrine to monetary exactions post-*Koontz*).

[12] Other jurisdictions have recognized that *Koontz* applies more broadly to government demands for money from a permit applicant as a condition of the permitting process. See *Anderson Creek Partners, LP v Harnett Co*, 382 NC 1, 28; 876 SE2d 476 (2022) (holding that *Koontz* is not limited to "in lieu of" fees and instead "encompassed a broader range of governmental demands for the payment of money as a precondition for the approval of a land-use permit."); *Beach & Bluff Conservancy v Solana Beach*, 28 Cal App 5th 244, 266; 238 Cal Rptr 3d 86 (2018) ("The unconstitutional conditions doctrine applies only where the condition at issue constitutes an 'exaction' in the form of either the conveyance of a property interest or the payment of money");

To conclude, however, that because plaintiff is demanding money as a condition of the permitting process, that the unconstitutional conditions doctrine applies to the Tree Ordinance, requires a more searching inquiry. We conclude that the doctrine applies to the factual circumstances of this case. First, the core concerns of the unconstitutional conditions doctrine are directly at play. This matter involves plaintiff's permitting process, wherein it has conditioned the issuance of a permit on either paying into the tree fund or replacing removed trees at defendant's cost. Consequently, plaintiff is positioned to potentially make extortionate demands through the permitting process that could frustrate the Fifth Amendment, while at the same time seeking to ensure that permit applicants, like defendant, bear the negative societal costs of their proposed development. *Koontz*, 570 US at 604-605.

Next, and more importantly, as the Court recognized in *Koontz*, "[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Id.* at 612. Stated differently, the predicate for an unconstitutional conditions claim is that the condition would constitute a taking of property without just compensation if the government imposed it on a property owner outside the permitting context. *Dolan*, 512 US at 384; *Nollan*, 483 US at 831. As the Court recognized in *Koontz*, 570 US at 613-614, requiring a land-use permit applicant to spend money improving public land can effect a taking if the demand is linked to and burdens the applicant's ownership of a specific parcel of land by diminishing its value. In this matter, requiring defendant to pay money into the tree fund commensurate with the number of trees removed from the property (the demand is linked to the parcel) has burdened plaintiff's 16-acre parcel of land because to use the property defendant must absorb nearly half a million in fees or costs, which is more than the property's market value. Under these circumstances, the demand for money is a taking of property without just compensation. For these foregoing reasons, then, plaintiff's demand for money under the Tree Ordinance is subject to the unconstitutional conditions doctrine of *Nollan* and *Dolan*.[13]

Turning to the application of this doctrine to the facts of this case, in order for the permitting condition—payment into the tree fund or replacement of trees—to pass constitutional muster, there must be a nexus and rough proportionality between the condition and the social costs of tree

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Alpine Homes, Inc v West Jordan, 424 P3d 95, 105; 2017 UT 45 (2017) ("[I]t is the government's demand for property—whether it be real property rights or an obligation to spend money—in exchange for the permit that is subject to evaluation under the *Nollan-Dolan* test."); *Mira Mar Dev Corp v City of Coppell, Texas*, 421 SW3d 74, 95-96 (Tex App, 2013) (applying unconstitutional conditions doctrine to ordinance where tree removal required payment of tree retribution fees). But see *Willie Pearl Burrell Trust v City of Kankakee*, 2016 Il App (3d) 150655; 56 NE3d 1067, 1079 (2016) (limiting unconstitutional conditions doctrine with respect to money to those situations in which the demand for money is inextricably linked to and burdens a specific parcel).

[13] While plaintiff disagrees, it has made no effort beyond pointing out the factual differences between this case and *Nollan*, *Dolan*, and *Koontz* to argue that *Koontz* is limited to monetary demands in lieu of dedications.

removal.[14] See *Koontz*, 570 US at 605-606. Plainly, an essential nexus exists between the permitting conditions and plaintiff's interest in conserving its natural resources. Requiring defendant to replace the trees at its own cost or pay into the tree fund for their replacement furthers plaintiff's legitimate conservation interest.

The next step of the analysis is the "rough proportionality" prong of *Nollan* and *Dolan*. Under this prong, this Court must "determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of [defendant's] proposed development." *Dolan*, 512 US at 388. "No precise mathematical calculation is required, but [plaintiff] must make some sort of individualized determination that the required [conditions are] related both in nature and extent to the impact of the proposed development." *Id*. at 391. Under this standard, the required relationship need not be "exacting," but it must be more than a "generalized" connection. *Id*. at 390.

Plaintiff has failed to meet its burden of showing that the permitting conditions as applied to defendant are roughly proportional to the impact of defendant's development. The Tree Ordinance requires preset mitigation. Tree Ordinance, § 5A.08. Defendant must replace one tree for each nonlandmark tree removed and three trees for each landmark tree removed, either by replanting the trees at its own cost or by paying into the tree fund for the replacement of the trees at the same ratio. Tree Ordinance, § 5A.08(A)(B), (E). However, there is no evidence in the record, nor any argument from plaintiff on appeal, that this required mitigation bears any relationship to the impact of defendant's tree removal. Indeed, completely lacking from the record is any individualized assessment of the impact of defendant's clear-cutting of trees from its 16 acres. Plaintiff, for example, provided no evidence that defendant's tree removal caused any environmental degradation generally, and admitted it had no evidence that the removal caused any environmental harm to neighboring parcels, for example, by creating a flooding hazard. There is also no evidence that plaintiff considered any positive impacts the tree removal may have had, which by defendant's allegations included the removal of invasive species and clearing debris from the property. In sum, because plaintiff has not shown that the permitting conditions (the mitigation measures) are roughly proportional to the impact of defendant's development, plaintiff's Tree Ordinance as applied is an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*.

Based on our conclusion that a taking occurred under the unconstitutional conditions doctrine of *Nollan* and *Dolan*, we need not address defendant's remaining takings claims.

VI. THE EIGHTH AMENDMENT—EXCESSIVE FINES

On cross-appeal, defendant argues that the circuit court erred by finding that the mitigation fees demanded under the Tree Ordinance were not subject to the Eighth Amendment. According to defendant, the tree payments are fines because they are designed to have a deterrent effect of

[14] Collateral estoppel does not apply to this portion of the analysis, despite that the Sixth Circuit considered this issue as it related to FP, because the inquiry is fact-specific to defendant's particular land and development.

preventing individuals from removing trees. Defendant further asserts that these fines are excessive because they lack proportionality.[15]

The Excessive Fines Clause of the Eighth Amendment provides that "excessive fines" shall not be "imposed." Us Const, Am VIII. As the United States Supreme Court has recognized, the Excessive Fines Clause "guards against abuses of [the] government's punitive or criminal-law-enforcement authority[,]" *Timbs v Indiana*, ___ US ___, ___; 139 S Ct 682, 686; 203 L Ed 2d 11 (2019), consistent with the purposes of the Eighth Amendment to limit the government's power to punish, *Austin v United States*, 509 US 602, 609; 113 S Ct 2801; 125 L Ed 2d 488 (1993). Consequently, "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for *some offense*." *Id*. at 609-610 (quotation marks and citation omitted). It follows that a demand that serves either retributive or deterrent purposes, even if partly remedial in purpose, is punishment subject to the Excessive Fines Clause. *Id.* at 621. However, a monetary demand that serves solely a remedial purpose, which is related to "any damages sustained by society or to the cost of enforcing the law," is not subject to the Excessive Fines Clause. *Id*. (quotation marks and citation omitted). The relevant question, then, is whether the Tree Ordinance's tree fund fees are punitive.

We conclude that the tree fund fees serve an entirely remedial purpose. The Tree Ordinance is designed to remedy the harms caused by tree removal by demanding fees based on the cost to replace the trees removed. Because the fees collected are used to remedy damage the public sustains because of tree removal, the tree fund fees are remedial. Defendant, however, contends that the tree fund fees are at least partially punitive because they are intended to compel compliance with the Tree Ordinance and deter individuals from removing trees. While defendant's assertion is supported by dubious evidence,[16] compelling compliance with, and deterring a violation of, a land-use regulation, like the Tree Ordinance, is correlated to the damages sustained by society when that ordinance is violated, not the furtherance of some criminal law. Consequently, it cannot be said that any part of the Tree Ordinance is punitive. In sum, the tree funds fees are not subject to the Excessive Fines Clause of the Eighth Amendment.

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[15] Plaintiff asserts that collateral estoppel precludes consideration of defendant's Eighth Amendment argument. However, for reasons already explained, collateral estoppel does not apply against defendant because it was not a party to the prior litigation.

[16] Defendant cites the testimony of plaintiff's witness, Jeff Goulet, in support of its assertion that plaintiff conceded that the purpose the Tree Ordinance's tree fund fees is to ensure compliance and deter tree removal. Goulet, however, did not testify that that was the purpose of the tree fund fees. Rather, Goulet testified, "our intent is to achieve compliance with the ordinance," in response to defense counsel's question, "What's the purpose of requiring individuals who cut down trees without a permit to go through the permit process and make that payments or whatever after the fact?" In other words, it is plaintiff's intent to enforce the Tree Ordinance after the fact in instances in which an individual does not obtain a permit before removal of trees. Goulet did testify, however, that "[t]he Code provides a disincentive for doing that [i.e., removing all trees from a property] in terms of preserving the forest that was there to begin with."

VII. CONCLUSION

The trial court summary disposition order is reversed to the extent that it held that the tree ordinance as applied to defendant violated the Fourth Amendment. The trial court order is affirmed with respect to the takings claims under the unconstitutional conditions doctrine and the Excessive Fines Clause claim under Eighth Amendment.[17] We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Stephen L. Borrello

[17] The partial reversal with respect to the Fourth Amendment does not necessitate a remand for consideration whether dismissal of plaintiff's complaint (which sought to enforce the Tree Ordinance) was proper. This is because an unconstitutional ordinance is unenforceable and we affirm the circuit court's conclusion that the Tree Ordinance was unconstitutional on grounds other than the Fourth Amendment.